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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1918

CARY HAWKINS AND MICHAEL HOLDERFIELD
Petitioners,

v.

CITY OF BIRMINGHAM
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF
CRIMINAL APPEALS

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PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF
CRIMINAL APPEALS

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinions and judgments of the Alabama Court of Criminal Appeals entered in the above cases on December 4, 1979.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals concerning Michael Holderfield is appended hereto as Appendix A. *Holderfield v. City of Birmingham*, 380 So.2d 990 [Ala. Crim. App. 1979] (A. 1 - A. 8). The denial of Michael Holderfield's Petition for Writ of Certiorari by the Supreme Court of Alabama is attached hereto as Appendix B. *Holderfield v. City of Birmingham*, 380 So.2d 994 [Ala. 1979] (A. 9).

The opinion of the Alabama Court of Criminal Appeals concerning Cary Hawkins is appended hereto as Appendix C. *Hawkins v. City of Birmingham*, 380 So.2d 995 [Ala. Crim. App. 1980] (A. 10). The denial of Cary Hawkins' Petition for Writ of Certiorari by the Supreme Court of Alabama is attached hereto as Appendix D. *Hawkins v. City of Birmingham*, 380 So.2d 995 [Ala. 1980] (A. 11).

JURISDICTION

The Judgments of the Alabama Court of Criminal Appeals were entered on December 4, 1979 (Appendix A, A. 1 - A. 8, Appendix C, A. 10). The requests for Rehearing of both decisions were denied by the Alabama Court of Criminal Appeals on January 22, 1980 (Appendix A, C). The Supreme Court of Alabama denied Certiorari for both Appellants on March 7, 1980 (Appendix B, D). This Court's jurisdiction is invoked under Title 28 U.S.C. §1257 (3) (Appendix E, A. 12 - A. 16).

QUESTIONS PRESENTED

I. Whether, in obscenity cases, a trial by jury is required in the first instance on the issue of contemporary community

standards; trial by jury after appeal to Circuit Court from bench conviction in Municipal Court does not satisfy constitutional requirements.

II. Whether the enforcement of City of Birmingham Ordinance 16-18, as amended, against Petitioner and others of his class who own, operate, or are employed by adult book stores or adult theatres in the City of Birmingham, while permitting owners, operators, and employees of other business establishments in the city, for whatever reason or justification, to sell publications or show movies which describe or depict sexual conduct also in presumptive violation of said ordinance, works out unequally and invidiously towards Petitioners and others of their class and constitutes discrimination violative of the Equal Protection Clause of the Fourteenth Amendment.

III. Whether the magistrate in these cases determined the issue of probable cause where no adequate basis for such a finding appears on the face of the complaints and oral testimony of the magistrate fails to cure the otherwise defective affidavit of the police officer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Sixth and Fourteenth Amendments of the United States Constitution, the pertinent provisions of Sections 2-97, 16-16 and 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended, Alabama Code section 12-14-6 (1975) and Title 28 U.S.C. §1257 (3), appear in Appendix E (A. 12-A. 16) (U.S. Const. Amends. I, IV, VI, XIV; Alabama Code §12-14-6 (1975); Section 2-97 of the General Code of the City

of Birmingham, Alabama, 1964, as amended; Section 16-16 of the General Code of the City of Birmingham, Alabama, 1964, as amended; Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended).

STATEMENT

1. Petitioners were charged with violation of the obscenity ordinance of the City of Birmingham. The complaint against Cary Hawkins alleged that Petitioner " . . . knowingly and unlawfully sold an obscene book or magazine or matter entitled, 'Locker Room Workout,' to D. L. McNutt which depicted or portrayed the following sexual conduct: actual act or acts of homosexuality between males, contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended." The complaint against Michael Holderfield alleged that Petitioner ". . . knowingly and unlawfully sold an obscene book or magazine or matter entitled, "Color Sperma", to D. L. McNutt which depicted or portrayed the following sexual conduct: actual act or acts of fellatio, sexual intercourse contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

On May 10, 1978, Petitioner, Cary Hawkins, was tried in the Municipal Court of the City of Birmingham on the complaint filed against him, without a jury, and was convicted. Petitioner was fined $300 and sentenced to 60 days in jail. Petitioner appealed to the Circuit Court of Jefferson County, Tenth Judicial Circuit. On November 16, 1978, Petitioner, Cary Hawkins, was tried before a jury on the Complaint before the Honorable Charles M. Nice. After a two day jury trial,

Petitioner was found guilty. Petitioner was sentenced to pay a fine of $500.00 and perform hard labor for the City of Birmingham for 180 days as additional punishment. The fine was assessed by a jury and the hard labor sentence was added by the Court.

On May 10, 1978, Petitioner, Michael Holderfield, was tried in the Municipal Court of the City of Birmingham on the Complaint filed against him, without a jury, and was convicted. Petitioner was fined $300 and sentenced to 60 days in jail. Petitioner appealed to the Circuit Court of Jefferson County, Tenth Judicial Circuit. On March 22, 1979, Petitioner, Michael Holderfield, was tried before a jury on the Complaint before the Honorable William A. Cole. After a two day jury trial, Petitioner was found guilty. Petitioner was sentenced to pay a fine of $500.00 and perform hard labor for the City of Birmingham for 180 days as additional punishment. The fine was assessed by a jury and the hard labor sentence was added by the Court.

2. In both cases, a Motion to Quash was filed raising constitutional questions as to the ordinance under which Petitioners were tried, both as written and as applied to them.

The Motion to Quash in each case specifically raised the issues of arbitrary and intentional discriminatory enforcement of the ordinance (obscenity) by the city. The city purposefully and intentionally enforces its obscenity ordinance against one class of employees, those employed in adult bookstores and adult theatres, while permitting another class of employees, those employed in non-adult bookstores or theatres (general patronage businesses such as convenience stores, drug stores, newsstands, bookstores and family theatres), to sell books and

magazines or exhibit films which describe or depict sexual conduct in presumptive violation of the city's obscenity ordinance, without fear of prosecution. The Motion further questioned the constitutionality of the city's ordinance for its failure to provide a jury determination of contemporary community standards in obscenity prosecutions. Also whether in obscenity prosecutions a trial by jury is required in the first instance, a trial by jury after appeal to the Circuit Court being insufficient to satisfy the requirements of the United States Constitution.

The Motion also questioned whether the magistrate found probable cause to issue the arrest warrant, there being no adequate basis for such a finding on the face of the complaint and oral testimony of the magistrate failing to cure the otherwise defective affidavit of the police officer.

The Motions to Quash were overruled, and the Petitioner in each case was tried before a jury and found guilty as charged in the complaint. In each case, the sentence imposed by the jury and the Court was suspended pending appeal.

4. The Court of Criminal Appeals affirmed both Petitioners' convictions with opinions on December 4, 1979, and Applications for Rehearing were timely filed and denied on January 22, 1980, (Appendix A, A. 1 - A. 8; Appendix C, A. 10).

5. A Petition for Writ of Certiorari was timely filed by each Petitioner with the Supreme Court of Alabama and both were denied without opinion on March 7, 1980, (Appendix B, A. 9; Appendix D, A. 11).

REASONS FOR GRANTING THE WRIT

1. Sections 12-14-6, Code of Alabama 1975, provides that "Ail cases in municipal courts shall be tried by a judge without a jury." Alabama case law has consistently held that the constitutional right of trial by jury does not extend to trials under city ordinances. *Birmingham v. Evans*, 53 Ala. App. 358, 300 So.2d 396 (1974); *City of Birmingham v. Williams*, 229 Ala. 101, 155 So. 877; *Donahey v. City of Montgomery*, 43 Ala. App. 20, 178 So.2d 832. Further, this Court, in *Duncan v. Louisiana*, 391 U.S. 145, at 159, reaffirmed a long-established view that "petty offenses" may be tried without a jury, and in *Baldwin v. New York*, 399 U.S. 66, 69 (1970), the plurality opinion of Mr. Justice White concluded that the severity of the sentence would determine whether an offense will be deemed "petty" for purposes of the right to trial by jury. Petitioner argues and urges that an obscenity prosecution is and must be an exception to this rule.

On June 21, 1973, in *Miller v. California*, 413 U.S. 15, 23, 25, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419, this Court reformulated the constitutional test for determining obscenity and said:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); *United States v. Reidel*, 402 U.S. (351), at 354, 91 S.Ct. (1410), at 1411-1412 (28 L.Ed.2d 813); *Roth v. United States*, supra, 354 U.S. (476), at 485, 77 S.Ct. (1304), at 1309 (1 L.Ed.2d 1498). 'The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted).' *Breard v. Alexandria*, 341 U.S. (622), at 642, 71 S.Ct. (920), at 932 (95

L.Ed. 1233), and cases cited. See *Times Film Corp. v. Chicago*, 365 U.S. 43, 47, 50, 81 S.Ct. 391, 393-395, 5 L.Ed.2d 403 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. (495), at 502, 72 S.Ct. (777), at 780 (96 L.Ed. 1098). We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas*, supra, 390 U.S. (676), at 682, 685, 88 S.Ct. (1298), at 1302, 1305 (20 L.Ed.2d 225). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting *Roth v. United States*, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value'

test of *Memoirs v. Massachusetts*, 383 U.S. (413), at 419, 86 S.Ct. (975), at 977 (16 L.Ed.2d 1); that concept has never commanded the adherence of more than three Justices at one time. See supra, (413 U.S. at 21) at 2613. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois v. Wisconsin*, supra, 408 U.S., at 232, 92 S.Ct., at 2247; *Memoirs v. Massachusetts*, supra, 383 U.S., at 459, 460, 86 S.Ct., at 998 (Harlan, J., dissenting); *Jacobellis v. Ohio*, 378 U.S. (184), at 204, 84 S.Ct. (1676), at 1686 (12 L.Ed.2d 793) (Harlan, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); *Roth v. United States*, supra, 354 U.S., at 497, 498, 77 S.Ct., at 1315, 1316 (Harlan, J., concurring and dissenting).

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See *Kois v. Wisconsin*, supra, 408 U.S., at 230, 232, 92 S.Ct., at 2246, 2247; *Roth v. United States*, supra, 354 U.S., at 487, 77 S.Ct., at 1310; *Thornhill v. Alabama*, 310 U.S. 88, 101-102, 60 S.Ct. 736, 743, 744, 84 L.Ed. 1093 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. *In resolving the inevitable sensitive questions of fact and law, we must continue to rely on the jury system.*" (Emphasis added).

The application of the "contemporary community standards" guideline was explained by Mr. Justice Rehnquist in *Hamling v. United States*, 418 U.S. 87 (1974), at page 105:

"*Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as 'hypothetical and unascertainable,' 413 U.S., at 31, 93 S.Ct., at 2619. But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the

> understanding of 'the average person, applying contemporary community standards.' 413 U.S., at 24, 93 S.Ct., at 2615. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973) of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. *A juror* is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes . . . in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case."

Miller states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulated are "essential questions of fact". *Jenkins v. Georgia*, 418 U.S. 153 (1974).

This Court, in *Smith v. United States*, 97 S.Ct. 1756 (1977) has held that the issues of "appeal to prurient interest" and "patent offensiveness" are fact questions for the jury, to be judged in light of the jurors' understanding of contemporary community standards. The Court stated at page 1763:

> "The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal

> to the prurient interest is one such question of fact *for the jury to resolve*. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. *See Hamling v. United States*, 418 U.S. at 104-5." (Emphasis added)

Therefore, *Miller*, as explained in *Hamling*, means that in determining obscenity under the First and Fourteenth Amendments, a jury determination of contemporary community standards is constitutionally required. *McNary v. Carlson*, 527 S.W.2d 343 (Mo. 1975); *City of Kansas v. Darby*, 544 S.W.2d 529 (Mo. 1977), appeal dismissed, 21 Crim.L. Rep. (BNA) 4065; *State v. Luck*, 353 So.2d 225 (La.1977).

In *City of Kansas City v. Darby, supra*, the Missouri Supreme Court held that the denial of a jury trial on the issue of community standards in an obscenity prosecution in municipal court was unconstitutional, notwithstanding the fact that the municipal court was barred by ordinance from providing a trial by jury or that a jury was available on appeal to the circuit court. The City of Kansas City appealed this case to the United States Supreme Court where, on May 31, 1977, the appeal was dismissed. The *Darby* appeal raised the question "Does the First and Fourteenth Amendments require that questions of obscenity be decided by a jury?" See 21 Crim.L.Rep. 4048 (1977). This Court's denial of the City of Kansas City's appeal strongly suggests that a jury of one's peers must determine questions of obscenity.

The Supreme Court of Minnesota on August 31, 1979, agreed that a criminal obscenity charge must be tried to a jury. *City of Duluth v. Sarette*, 26 Crim.L.Rep. (BNA) 2039 (Minn. 1979). The Minnesota Court stated that:

> "The need for a jury determination is particularly compelling in cases such as this where no expert testimony or extrinsic evidence other than the allegedly obscene material itself is admitted at trial. When the issue is tried to the court, a judge is placed in the unenviable position of determining contemporary community standards, either upon impressions formed from his contacts with residents or upon his individual opinion of the locality's values. Neither of these alternatives is wholly consistent with the test enunciated in *Miller v. California*, 413 U.S. 15 (1973). In contrast, a jury represents a cross section of the community and is better equipped to make the important and sensitive determination of community standards required in an obscenity prosecution although it is clear that a jury trial is not constitutionally mandated under the circumstances, *see, Duncan v. Louisiana*, 391 U.S. 145 (1968), we believe that the contemporary-community-standards test can best be applied by a jury and therefore hold, under the supervisory powers of this court, that a criminal obscenity charge must be tried to a jury." *City of Duluth v. Sarette, supra*, at page 2039.

In rejecting Petitioners contention that a jury trial should be required in all criminal obscenity prosecutions, the Alabama Court of Criminal Appeals seized upon the language of the Supreme Court of Minnesota in *Sarette* "that a jury trial is not constitutionally mandated under the circumstances." It chose, however, to completely disregard *Darby* and the fact that that case was appealed to this Court by the City of Kansas City on the very issue raised by these Petitioners and the appeal was denied. It also chose to ignore the fact that the Minnesota Court also held "that a criminal obscenity charge must be

tried to a jury." The Alabama Court further ignored the suggestions made and the directions set in cases decided by this Court *(Miller, Hamling, Jenkins, Smith)* for requiring a jury trial in criminal obscenity prosecutions.

In this respect, Alabama stands alone as far as Petitioners can determine. Most states which prosecute obscenity violations do so in its state courts, where a jury trial is available. In the few states where obscenity prosecutions are begun in a municipal or district court where a jury trial is unavailable, and the question has been presented to its highest court, except for Alabama, the courts have uniformly held that only a jury can determine community standards - only a jury can determine whether or not the publication, applying contemporary community standards, appeals to the prurient interest - only a jury can determine whether or not, again applying contemporary community standards, the sexual conduct described or depicted in the publication is patently offensive.

The Alabama Court, without explanation, other than to uphold the constitutionality of the Alabama statute requiring all cases in municipal courts shall be tried without a jury, ruled that "the defendant was not denied due process of law." The Alabama statute need not be unconstitutional for these Petitioners to be denied due process. Obscenity prosecutions are a special breed - made so because of this Court's reasoning in *Miller v. California, supra*, and *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), as explained in *Hamling v. U.S., supra*. *Miller* required an understanding of the average person, applying contemporary community standards. *Paris* did not require affirmative proof of the obscenity of the materials. *Hamling* explained that the import of *Miller* and *Paris* was clear - that

"a juror is entitled to draw on his own knowledge of the view of the average person in the community or vicinage from which he comes for making the required determination . . ." at page 2615.

Duncan v. Louisiana, supra, cited by the Alabama Court for the proposition that a jury trial is not mandated for a court where the maximum fine is $500.00 and the maximum jail sentence is six months, was decided in 1968, long before this Court established its present evidentiary rules for criminal obscenity prosecutions. In view of *Miller* and *Hamling* and *Smith*, an exception to *Duncan* would lie in criminal obscenity prosecutions where "the issue of contemporary community standards for appeal to the prurient interest and patent offensiveness. . .[are] questions for the jury to decide in its traditional role as fact-finder." *Smith*, supra, at p. 1767.

A constitutionally acceptable determination of obscenity cannot be made in the Municipal Court of Birmingham because no jury is available. This constitutional deficiency cannot be cured by the process of allowing an appeal to the Circuit Court where a jury is available. *Callan v. Wilson*, 127 U.S. 540 (1888). In *Callan*, this Court said at page 557:

> ". . .to accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

Recognizing that in Alabama under ordinary circumstances, a trial by jury is not necessary for violation of a city ordinance,

Birmingham v. Evans, supra, an exception exists in determining whether or not material is obscene. If a determination is made, based on contemporary community standards, that material is not obscene, then it will be protected by the First Amendment. Only a jury can make that determination by applying contemporary community standards.

> "In *Blount v. Rizzi*, 400 U.S. 410, 416, 417, 91 S.Ct. 423, 428, 27 L.Ed.2d 498, 503 (1970), the Supreme Court of the United States cautioned that ". . .Government 'is not free to adopt whatever procedure it pleases for dealing with obscenity. . .without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant*, 367 U.S. 717, 731, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. . .Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards. . .is. . .but a special instance of the larger principle that the freedom of expression must be ringed about with adequate bulwarks. . .' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). Since we have recognized that 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated. . .is finely drawn. . .[t]he separation of legitimate from illegitimate speech calls for. . .sensitive tools. . .' *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). *City of Kansas City v. Darby*, supra, at 531.

A person is entitled to freedom of expression, in areas of alleged obscenity, until a jury of his peers declares otherwise. It is not constitutionally permissible to allow a municipal judge to restrict freedom of expression prior to the time a jury determines whether or not a magazine is obscene.

This Court let stand, by dismissing an appeal filed by the City of Kansas City, a Missouri Supreme Court decision that "*in obscenity cases only*, a trial by jury is required in the first instance and a trial by jury after appeal to Circuit Court 'does not satisfy the requirements of the Constitution'. (127 U.S. at 557, 8th S.Ct. at 1307)." *City of Kansas City v. Darby*, supra. *Martin v. Municipal Court of Kansas City*, 546 S.W.2d 7 (Mo. 1977). *City of Duluth v. Sarette*, supra, 2039. As a result, in Missouri criminal obscenity prosecutions are tried by a jury in the first instance. The Alabama Court, with exactly the same set of facts and court situation, concluded differently. Consequently, in Alabama the essential determination of "contemporary community standards" need not be made by a jury in the first instance. The two states are in conflict on the same point of law, a point of law essential to the determination of whether or not the material in question is obscene. By granting certiorari, this Court can review this issue and set the same procedural process for all states and for all offenders in the criminal enforcement of obscenity laws.

2. Each Petitioner was arrested, tried, and convicted for selling a publication in alleged violation of City of Birmingham Ordinance 16-18, as amended.

City of Birmingham Ordinance 16-18, as amended, states:

> "It shall be unlawful for any person to knowingly publish, print, exhibit, participate in the exhibition

> or performance of, or allow or permit the exhibition or performance of, distribute, or have in his possession with intent to distribute, exhibit, sell, or offer for sale any obscene matter in the City or the police jurisdiction thereof."

Found within Section 16-16 of this ordinance are definitions of words and terms which, for the purpose of the ordinance, have the meanings ascribed to them by this section. "Obscene" is defined as follows:

> "To the average person, applying contemporary community standards, the work or matter taken as a whole, appeals to the prurient interests; the work or matter depicts or describes, in a patently offensive way, sexual conduct; and the work or matter, taken as a whole lacks serious literary, artistic, political or scientific value."

The ordinance thus adopts the guidelines set out in *Miller v. California*, 413 U.S. 15 (1973), in its definition of "obscene."

"Sexual conduct" is defined in the ordinance as follows:

> "Any act of masturbation, excretory functions, homosexuality, sadomasochistic abuse, *nudity*, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breasts, *whether or not any such conduct is actual or simulated and lewd exhibition of the genitals*." (Emphasis added.)

"Nudity" is defined in said ordinance as:

> "The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering or the showing of the female breasts with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state."

It is petitioner's contention that the City of Birmingham, through its Vice Squad in the Police Department, exercises prosecutorial discretion in selecting the defendants it will prosecute under this ordinance.

It is a well-settled proposition that the Equal Protection Clause of the Fourteenth Amendment prohibits discriminatory enforcement of a law by administrative or executive officials. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In *Yick Wo* the Court stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at pp. 373-374.

The rationale of *Yick Wo* applies equally to the enforcement of a city's municipal laws. In *Marguia v. Municipal Court for Bakersfield*, 124 Cal. Reptr. 204, 540 P.2d 44 (1975), the California Supreme Court was confronted with Defendants charged with violations of municipal laws. Citing *Two Guys v. McGinley*, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed. 2d 551 (1961), and *Oyler v. Boyles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962), the California Court declared:

> "the Court explicitly recognized both that the Constitutional protection against discriminatory law enforcement applies to the enforcement of criminal statutes and that such discriminatory enforcement may be raised as a defense in the criminal proceedings themselves."

In *Simonetti v. City of Birmingham*, 55 Ala. App. 163, 314 So. 2d 83 (1975) the Alabama Appellate Court also acknowledged that a Defendant may properly raise selective or discriminatory enforcement of a municipal ordinance as a defense. The Petitioners did this in the Trial Court and before the Appellate Court, alleging discriminatory enforcement of City of Birmingham Ordinance 16-18, as amended, against them and other adult book store and adult theatre operators in violation of the Equal Protection Clause of the *Fourteenth Amendment*. The Alabama Appellate Court, in *Starley v. City of Birmingham*, 377 So.2d 1131 (Ala.Crim.App.) *cert. denied* 377 So.2d 1134 (Ala. 1979), *cert. denied*, 79-1476 (1980), states that "although no clear standards exist for the quantum or type of proof sufficient to illustrate discriminatory enforcement of a statute or municipal ordinance, three elements must generally be proved: (1) selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. Annot., 4 A.L.R.3d 404, 410 (1965); 13 Proof of Facts 2d Section 5 (1977), and authorities cited therein." The Court found that Petitioners did not meet their burden of proof in this regard.

To prove deliberate, systematic, discriminatory application of law towards an individual, it must be shown that the application towards the individual is different from others within his

class *or that the class is being discriminated against. Yick Wo v. Hopkins, supra; Marguia v. Municipal Court for Bakersfield, supra.*

The Petitioners are cognizant of the fact that nonenforcement of the statute in and of itself is not sufficient to establish discrimination, *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L.Ed. 497 (1944), and that a heavy burden rests on the defendant to establish conscious, intentional discrimination. In meeting the burden the United States Supreme Court has said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."
>
> "There must be something more - something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353, 38 S.Ct. 495, 62 L.Ed. 1154 (1918).

When selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others the boundaries of equal protection are crossed and violated. *People v. Utica Daw's Drug Co.*, 16 App. Div.2d 12, 225 N.Y.S. 2d 128, 4 A.L.R. 3d 393 (1962).

Petitioners argue that the proof offered in each of their cases was uncontradicted and unmistakable with reference to their contention that they and others in their class (their class being "adult bookstore operators") are discriminated against by the City in its enforcement of City of Birmingham Ordinance 16-18, as amended. Each Petitioner proved the elements set out in *Starley*. Still, the Alabama Court completely ignored the discrimination which admittedly exists in the City of Birmingham in the enforcement of its obscenity ordinance, even though it had before it as exhibits copies of the type publications being sold in non-adult business establishments in the City of Birmingham.

(1) Selectivity in Enforcement: The uncontradicted evidence is that arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult bookstores and adult theatres. There were six to eight such adult bookstores which sold publications depicting or describing the sexual conduct defined in the city's obscenity ordinance. These stores, and their employees, were subject to constant arrests for violation of City of Birmingham Ordinance 16-18, as amended. There are hundreds of drug stores, convenience stores, or other business establishments, open to the general public, which regularly sell publications depicting or describing sexual conduct in presumptive violation of the city's obscenity ordinance. And yet *not one* of these operators or employees has *ever* been arrested or tried for violating this same ordinance. The arresting officer in these cases swore that all during this time he knew the type of publications sold in the non-adult bookstores and magazine stands; that those publications depict simulated and/or explicit sexual activity, including pictures that show men and women engaged

in sexual intercourse, the male with his head between the legs of a female with his face in her genitals, simulating cunnilingus, and a female with her head between the legs of a male, simulating fellatio, and various forms of homosexual activity. In addition, at least five general patronage movie theatres in the City of Birmingham and two general patronage drive-in theatres either inside or just outside the city limits of Birmingham sometimes exhibited sexual films in presumptive violation of the city's obscenity ordinance, yet the city permits these non-adult movie theatres to show these films without fear of arrest.

(2) Selectivity that is Intentional: The testimony of the arresting officer convincingly demonstrates that the City's focus is only on adult bookstores and adult theatres and is both purposeful and intentional. The evidence shows a clear and unmistakable pattern of conduct by police officers of the City of Birmingham with reference to enforcing that city's obscenity ordinance. Since its enactment in 1973, only owners or employees of bookstores classified as "adult" have been subjected to arrests under the city's obscenity ordinance. The City admits giving a different classification to adult bookstores as compared with non-adult bookstores, although both sell sexually oriented materials in presumptive violation of the city's obscenity ordinance. The City admits that it prosecuted only those stores or theatres knowingly selling or exhibiting obscene matter, showing actual sexual acts (including penetration and bodily contact) as compared with simulated sexual acts where the individuals were nude and/or were in close proximity with the other but there was no penetration.

The city's obscenity ordinance was adopted by the governing body of the City of Birmingham in 1973, following the *Miller* decision. The ordinance's proscription is clear: obscene

matter, sold or exhibited, described or depicted, actual or simulated, is unlawful. The ordinance is due to be enforced equally against all who violate it or not at all. Nevertheless, only employees of adult book stores and adult theatres are arrested for selling sex publications or exhibiting sex films. The city admits it. The Alabama court says this is not discrimination.

Perhaps the Alabama Appellate Court associates pornography or obscenity only with graphic or pictorial illustrations of sexual conduct, rather than with written accounts of sexual activity. This is not an idea which this Court has embodied in its obscenity rulings. That is not what the ordinance itself proscribes. A completely verbal account, without photographs or illustrations, falls within the *Miller* rules, if otherwise it meets the test of that doctrine. While the photographs in publications sold in non-adult business establishments generally depict simulated sexual activity, some depict explicit sexual activity and all clearly and unmistakeably *describe* explicit sexual activity in presumptive violation of the city's obscenity ordinance. If it is the city's intent to prosecute only for graphic depictions of explicit sexual activity, not for written accounts of explicit sexual activity; if it is its intention to prosecute only for explicit sexual activity, not for simulated sexual activity; if it is its intention to not prosecute for nudity or lewd exhibitions of the genitals, then the city should change its ordinance and specify, as *Miller* provides, the type sexual activity it will prosecute. "If it can't be done in this fashion, then it must not be done at all." *Simonetti, supra*, (55 Ala.App. at 177, 314 So.2d at 95).

(3) Selectivity Based on. . .Other Arbitrary Classification: It is uncontradicted from the evidence that arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult book

stores and adult theatres. If the sale or exhibition of materials which depict or describe sexual conduct, actual or simulated, is in presumptive violation of the city's obscenity ordinance, then an arbitrary classification is established when the City directs its prosecutorial efforts against one class (the adult book store) for presumptively violating its ordinance while ignoring another class (the non-adult book store) for presumptively violating the same ordinance. Discriminatory application of the law towards an individual is shown when the class to which he belongs is being discriminated against. *Yick Wo v. Hopkins*, supra.

The "quantum or type of proof" offered by the Petitioners to illustrate discriminatory enforcement of the city's obscenity ordinance against them compares favorably with the "quantum or type of proof" accepted by the Alabama Appellate Court in *Simonetti v. City of Birmingham*, supra, and *Associated Industries of Alabama v. State*, 55 Ala. App. 217, 314 So.2d 879 (1975).

In this case:

1. The Petitioners were employed at adult book stores, and sold magazines to a police officer of the City of Birmingham in alleged violation of City of Birmingham Ordinance 16-18, as amended, for which they were arrested, tried and convicted.

2. There were numerous bookstores, drug and convenience stores which sold magazines describing or depicting sexual conduct proscribed by the city's obscenity ordinance.

3. No arrests were made by the City of Birmingham for publications sold other than in adult book stores.

In the case of *Simonetti v. City of Birmingham*, supra, the facts were:

1. Simonetti sold groceries on Sunday in alleged violation of the "blue laws" of the City of Birmingham, for which he was arrested, tried and convicted.

2. Although there were other business establishments open on Sunday selling their wares in alleged violation of the city's blue laws, none of their operators or employees were arrested.

In the case of *Associated Industries of Alabama v. State*, supra, the facts were:

1. Five domestic corporations, one domestic association, and five individuals were indicted by a special grand jury of Montgomery County, Alabama, for violating the State's Corrupt Practices Law, and were arrested, tried and convicted.

2. Numerous other individuals and groups, engaged in similar political activities during this same period of time, were not indicted by the special grand jury, although they were well known to the prosecution and were known to not have filed a statement of campaign expenditures with the Secretary of State, the charge for which the others were arrested, tried and convicted.

In *Simonetti* and *Associated Industries*, both decided in 1975 by the Alabama Court, that Court cited the following in support of its finding that there was discriminatory enforcement of the penal law involved in each case:

1. "In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Supreme Court said:

> 'Though the law itself be fair on its face, and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.' " *Simonetti, supra*, 53 Ala.App. at page 173, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala.App. at page 288, 314 So.2d at 889.

2. "In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the Supreme Court said:

> 'A law non-discriminatory on its face may be grossly discriminatory in its operation.' " *Simonetti, supra*, 53 Ala. App. at 173, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala.App. at 289, 314 So.2d at 890.

3. "In *East Coast Lumber Terminal v. Town of Babylon*, 2 Cir. 174 F.2d 106, Judge Learned Hand wrote:

> 'It has indeed been the law for over sixty years that the (14th) Amendment covers the unequal enforcement of valid laws, as well as any enforcement of invalid powers.' *Yick Wo v. Hopkins*, supra." *Simonetti, supra*, 53 Ala.App. at page 173, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala.App. at page 289, 314 So.2d at 889.

4. "In *Sunday Lake Iron Company v. Wakefield*, 247 U.S. 350-352, 38 S.Ct. 495, 62 L.Ed. 1154, the Supreme Court said:

> 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents*.' " (Emphasis added). *Simonetti, supra*, 53 Ala.App. at page 174, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala.App. at page 289, 314 So.2d at 890.

5. In *Simonetti, supra*, 53 Ala. App. at page 175, 314 So.2d at 93; this same Alabama Court said:

> "Police officers are sworn to uphold and enforce all laws within their jurisdiction . . . they permitted businesses in direct competition with appellant to remain open for business . . . and, thereby, go unwhipped of justice while hauling appellant into court to be fined and incarcerated.
>
> " . . . We find no trouble in concluding that appellant's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment have been blatantly violated and that his arrest and conviction were brought about by invidious discrimination in the unequal enforcement of the . . . laws of the City of Birmingham. To allow this conviction to stand would be a grave miscarriage of justice and would be wrong and unjust."

6. In *Simonetti, supra*, 53 Ala. App. at 177, 314 So.2d at 95, cited in *Associated Industries, supra*, 55 Ala. App. at 289, 314 So.2d at 890, the Alabama Court said:

> "We believe that if the law, all laws, is *enforced equally* and *justice is dispensed with an even hand*, and on a non-discriminatory basis, all citizens will maintain a high regard and a lofty respect for our Court system as administered under the Constitution. If it can't be done in this fashion, then it must not be done at all."

In *Simonetti, supra*, 55 Ala. App. at 172, 314 So.2d at 90, the Alabama Court quotes Federal District Court Judge Sam Pointer in discussing the question of burden in *John F. Lawhon Furniture Company v. Melvin Bailey*, (D. C. Ala. CA 72-1109):

> "The question then becomes, in order to make out the case, *must the plaintiff prove intentional sort of malicious discrimination and enforcement, or is it sufficient if the plaintiff proves that whatever the reason or justification, nevertheless in actual fact it works out unequally and invidiously toward him or it. I think it is the latter.* And if the Sheriff's Department, as I'm convinced under the evidence, cannot enforce this type of law throughout the entire county on a completely equal basis, then it should not be permitted to let its forces be directed as against one particular company in effect unequally, that is what it turns out to be, and again not from any intent to harm, but simply as the sheer result

> of the fact that there are other items, much more important that the Sheriff's Department could be doing ultimately than dealing with the victimless crime involving a number of its patrol cars in this type of investigative work. * * * * * *Either you have got to do it more equally than you have done . . . or not do it."* (Emphasis Added)

The following statement of the Alabama Court from *Simonetti, supra*, 55 Ala. App. at 177, 314 So.2d at 95, with appropriate changes, could well apply to this case:

> "It may be a violent presumption that the courts are not supposed to be ignorant of that which everybody knows; and everybody in this state knows one can go almost anywhere in [the City of Birmingham] and purchase a [sex magazine in presumptive violation of City of Birmingham Ordinance 16-18, as amended]. We indulge this presumption with the knowledge that the [City's obscenity] laws are not uniformly enforced."

The city's obscenity ordinance has been enforced only against owners, operators or employees of adult business establishments. The testimony in these cases verifies this. There is no claim that the law cannot be enforced equally against all who violate it. It is a matter of choice. If the city has the time and the manpower to arrest the same employees of the same adult businesses time and time again, surely it can find the time and manpower to arrest employees of business establishments classified as non-adult but which nevertheless sell publications or exhibit movies which describe or depict sexual conduct in presumptive violation of its obscenity ordinance.

Petitioners are not seeking protection from the law. They merely ask to be afforded the same protection of the law as are murderers, rapists, drug peddlers, "blue law" violators, those who violate the State's Corrupt Practices Law, and employees of the non-adult business establishments which sell adult materials.

3. The Affidavit of Complaint sworn to by the arresting officer before the Magistrate in the Petitioner Holderfield's case reads as follows:

> "Personally appeared before me, the undersigned authority in and for said Municipal Court of Birmingham, D. L. McNutt, who being first duly sworn, says on oath that he has probable cause for believing and does believe that Mike Holderfield, whose name is otherwise unknown to affiant, did within twelve months before making this affidavit and within the City of Birmingham, or the Police Jurisdiction thereof:
>
> Did unlawfully on to-wit: May 10, 1978, at approximately 11:20 a.m. at or near 3021 Bessemer Road, Bessemer News, Birmingham, Jefferson County, Alabama, knowingly publish, print, exhibit, distribute, or have in his possession with intent to distribute, exhibit, sell, or offer for sale in the City of Birmingham, Alabama, any obscene matter, to-wit: an obscene book, "Color Sperma", contrary to and in violation of General City Code 16-18 as amended against the laws and ordinances of the City of Birmingham.
>
> //D. L. McNutt//

Sworn to and subscribed before me this 17th of May, 1978.

//J. M. Burns//
Magistrate of Municipal Court
of Birmingham"

The Affidavit of Complaint sworn to by the arresting officer before the Magistrate in Petitioner Hawkins' case reads as follows:

"Personally appeared before me, the undersigned authority in and for said Municipal Court of Birmingham, D. L. McNutt, who being first duly sworn, says on oath that he has probable cause for believing and does believe that Cary Hawkins, whose name is otherwise unknown to affiant, did within twelve months before making this affidavit and within the City of Birmingham, or the Police Jurisdiction thereof:

Did unlawfully on to-wit: May 10, 1978, at approximately 12:45 p.m. at or near 7610 North 1st Avenue, Birmingham, Jefferson County, Alabama, knowingly publish, print, exhibit, distribute, or have in his possession with intent to distribute, exhibit, sell, or offer for sale in the City of Birmingham, Alabama, any obscene matter, to-wit: an obscene book, "Locker-Room Workout", contrary to and in violation of General City Code 16-18 as amended against the laws and ordinances of the City of Birmingham.

//D. L. McNutt//

Sworn to and subscribed before me this 17th of May, 1978.

//J. M. Burns//
Magistrate of Municipal Court
of Birmingham"

Based upon these affidavits, Petitioners were arrested, tried and convicted in the Municipal Court of Birmingham. The Alabama appellate court found each affidavit to be "in and of itself. . . insufficient to support a finding of probable cause for a warrant of arrest because it only recites the affiant's belief and contains no supporting facts or circumstances upon which a finding of probable cause could be based. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello v. United States*, 357 U.S. 481, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958)."

However, the Alabama appellate court stated that the reviewing court is not restricted to examining the four corners of the affidavit in passing on the validity of an arrest warrant. *United States v. Character*, 568 F.2d 442, 445 (5th Cir. 1978). "A reviewing court may consider an affiant's *oral testimony*, extrinsic to the written affidavit, *which is sworn before the issuing magistrate*, in determining whether the warrant was founded on probable cause. *United States v. Hill*, 500 F.2d 315, 320-21 (5th Cir. 1974). Oral testimony is admissible to cure an otherwise defective warrant *Oliver v. State*, 46 Ala. App. 118, 238 So.2d 916 (1970); *Funches v. State*, 53 Ala. App. 330, 299 So.2d 771, cert. denied, 292 Ala. 752, 299 So.2d 778 (1974)." (Emphasis added.)

The oral testimony in these cases does not cure these defective warrants. The magistrate who issued the arrest

warrants was a law student, had taken no special courses, attended no seminars, nor received any special instructions dealing with the subject of obscenity. He executed the arrest warrant after being requested to do so by the arresting officer. However, there is absolutely no evidence that the affiant swore to any testimony, other than the conclusory statements found in the affidavits themselves. The magistrate did not question the arresting officer and reduce his answers to writing. The defective warrants issued by the magistrate were prepared by the arresting officer prior to his going in to see the magistrate. The magistrate had no specific recollection of having examined or even seeing the magazine sold by Holderfield, no recollection of it even being brought to him for his examination of it, nor did he remember any of the circumstances or the basis for his issuing arrest warrants for the Petitioners. Even the officer who took the magazines to him did not remember how long the magistrate "examined" them, although when pressed to give his best judgment, he ventured "ten minutes." There was no proof of any discussion with the magistrate concerning the contents of either magazine, and no finding of probable cause by the magistrate that the magazines were obscene. The executed affidavits and arrest warrants stated that the officer, not the magistrate, had probable cause for believing the magazines were obscene and the magistrate signed the arrest warrants based upon those affidavits.

Section 2-97 of the General Code of the City of Birmingham, Alabama, 1964, provides that a writ of arrest can be issued by a city magistrate only upon a written and sworn complaint that an offense has been committed and setting forth sufficient facts tending to establish the commission of the offense and the guilt of the defendant. The provisions of this ordinance must be read in light of the constitutional requirements it implements. The Fourth Amendment to the United

States Constitution provides "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." Article I, Section 5, Constitution of Alabama of 1901, provides "No warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation."

The language of the Fourth Amendment and Article I, Section 5, of the Alabama Constitution applies to arrest as well as search warrants. *Malone v. State*, 51 Ala.App. 19, 282 So.2d 367 (1973); *Giordenello v. United States*, 357 U.S. 481, 485-486 (1958).

"The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Malone v. State*, supra at 21.

"The decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exist for the warrant." *Whitely v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 564, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971).

"The Court must still insist that the magistrate perform his 'mutual and detached' function and not serve merely as a rubber

stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

The purpose of the complaint, then, is to enable the appropriate magistrate to determine whether the "probable cause" required to support a warrant exists. The magistrate must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He cannot accept without question the officer's mere conclusion that the person whose arrest is sought has committed a crime.

There is absolutely no evidence of sworn to, oral testimony by the affiant in the record from which the magistrate could have found probable cause to issue these warrants. The strict requirements of the law with regard to the issuance of search warrants and arrest warrants were adopted to prevent just this type situation, where a police officer of the City of Birmingham can type up his own affidavit and arrest warrant and present it to a magistrate for his signature. From the testimony given, the magistrate, a law student with no legal or judicial background, merely rubber stamped the request of the arresting officer. Surely, this Court must recognize that the magistrate would remember most of the details involving a "sex publication" if, in fact, he had examined it. The testimony is, and the facts are, that less than twenty such cases were presented to him, if indeed they were, during the time he was a magistrate for the City of Birmingham. There are just some subject matters that people do not forget and sex is one of them. If, as the Fourth Amendment to the United States Constitution and Article I, Section 5, Constitution of Alabama of 1901 requires, the judicial officer issuing an arrest warrant *is supplied with sufficient information* to support an independent judgment that probable cause exists for the warrant, then the testimony of both the magistrate and the officer would

not be so "fuzzy" that they can remember nothing that was said or done other than the preparation of an affidavit and the execution of an arrest warrant.

The written affidavits of the officer in these cases do not set forth any sufficient basis upon which a finding of probable cause could be made. All testimony taken on the motions clearly shows that the magistrate did not issue the arrest warrants in these cases based upon *his* finding that probable cause existed that the publications involved herein were obscene. The Alabama appellate court agreed that no adequate basis for finding probable cause appeared on the face of the complaints. The testimony of the magistrate that he had no recollection of ever examining or reading the magazines nor of even issuing the arrest warrants exemplifies the requirement for an affidavit to contain sufficient information for a magistrate to judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. To agree to less would be an open invitation for officers to obtain open-ended warrants for arrest from a "friendly" magistrate.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal appeals.

Respectfully submitted,

Ferris S. Ritchey, Jr., Esquire
Attorney for Petitioners

APPENDIX

APPENDIX A

Michael HOLDERFIELD

v.

The CITY OF BIRMINGHAM.

6 Div. 38.

Court of Criminal Appeals of Alabama.

Dec. 4, 1979.

Rehearing Denied Jan. 22, 1980.

BOWEN, Judge.

This is a pornography case involving the sale of a magazine entitled "Color Sperma" in violation of Birmingham City Ordinance 16-18 as amended.

The defendant was employed as a clerk by the Bessemer News, an adult bookstore in Jefferson County. In May of 1978, an officer of the Vice Squad of the Birmingham Police Department purchased the magazine from the defendant. The defendant was tried without a jury in Municipal Court and convicted. He appealed to the Circuit Court of Jefferson County, was tried by a jury, convicted and fined five hundred dollars and costs.

A. 2

I

The defendant contends that under the United States Supreme Court's definition of obscenity stated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), only a jury can apply "contemporary community standards" in determining whether a publication is obscene. Although Alabama Code (1975), § 12-14-6, provides that "(a)ll cases in municipal courts shall be tried by a judge without a jury", the defendant contends that an obscenity prosecution must be the exception to this statute.

While neither *Miller* nor *Hamling* specifically states that only a jury can determine the issue of obscenity, the Supreme Courts of Missouri and Minnesota have found such a holding implicit.

In *McNary v. Carlton*, 527 S.W.2d 343 (Mo.1975), the Supreme Court of Missouri held that in obscenity cases jurors must be the triers of fact.

> "*Third*, in considering application of the 'contemporary community standards' guideline, we must note the following language from *Hamling v. United States*, 418 U.S. 87, at 104 and 105, 94 S.Ct. 2887, 2900, 41 L.Ed.2d 590:
>
> * * * * *
>
> " '(T)he test (for determining obscenity) was stated in terms of the understanding of 'the average person, applying contemporary community standards'. 413 U.S., at 24, 93 S.Ct., at 2615. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I v. Slaton*, 413

U.S. 49, 56, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973) of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.

* * * * *

" 'The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case.'

* * * * *

"However, we consider the above language extremely significant. The emphasis which *Miller* and *Hamling* place on the *unique* qualifications of *jurors* to apply the 'contemporary community standards' guideline raises a practical question in this suit for injunctive relief. . . . In 'obscenity' cases, we believe we should 'rely on the jury system' (413 U.S., at 26, 93 S.Ct. 2607), and require that jurors be involved as triers of fact under the *Miller* guidelines."

McNary, 527 S.W.2d at 346-7.

In *City of Kansas City v. Darby*, 544 S.W.2d 529 (Mo. 1976), the Missouri Supreme Court applied *McNary* and held that the denial of a jury trial on the issue of community standards in an obscenity prosecution in municipal court was unconstitutional, notwithstanding the fact that the municipal court was barred by ordinance from providing a trial by jury or that a jury was available on appeal to the circuit court.

> "We hold, in *obscenity cases only*, that a trial by jury is required in the first instance and that a trial by jury after appeal to circuit court 'does not satisfy the requirements of the Constitution'.
>
> "We recognize that today's holding renders the Kansas City obscenity ordinance unenforceable so long as juries are not permitted in Kansas City municipal courts." (citations omitted) *Darby*, 544 S.W.2d at 532.

This same result was reached in *Martin v. Municipal Court of Kansas City*, 546 S.W.2d 7 (Mo. 1976), and *XLNT Corporation v. Municipal Court of Kansas City*, 546 S.W.2d 6 (Mo. 1976).

The Supreme Court of Minnesota, exercising its "supervisory powers", has recently decided that a criminal obscenity charge must be tried before a jury even though not constitutionally required.

> "The need for a jury determination is particularly compelling in cases such as this where no expert testimony or extrinsic evidence other than the allegedly obscene material itself is admitted at trial. When the issue is tried to the court, a judge is placed in the unenviable position of determining contemporary community standards, either upon impressions formed from his contacts with residents

> or upon his individual opinion of the locality's values. Neither of these alternatives is wholly consistent with the test enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)]. In contrast, a jury represents a cross section of the community and is better equipped to make the important and sensitive determination of community standards required in an obscenity prosecution. *Although it is clear that a jury trial is not constitutionally mandated under these circumstances*, see, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), we believe that the contemporary-community-standards test can best be applied by a jury and therefore hold, *under the supervisory powers of this court*, that a criminal obscenity charge must be tried to a jury."
> *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn. 1979) (emphasis added).

Sarette makes it clear that while the jury system may be the best method for determining obscenity as defined in *Miller v. California*, it is not a constitutional requirement. The statute requiring that all cases in municipal courts shall be tried by a judge without a jury is not unconstitutional as it applies to an obscenity prosecution in the municipal court. In this regard, the defendant was not denied due process of law.

Additionally, we note that the defendant never requested a trial by jury in the municipal court. The question of the constitutionality of the city ordinance and its failure to provide for a jury determination of obscenity was first raised by the defendant on appeal before the circuit court. Since the record shows no objection to being prosecuted in the municipal court until after the defendant had been convicted, we do not think he should be heard to complain. We do not think that it

would have been a mere useless or futile gesture for the defendant to have voiced his objection before the municipal judge. We note that in *Martin*, supra, upon which the defendant bases his argument, the accused did file a motion for a jury trial in the municipal court even though a statute prohibited a jury trial in the municipal court.

II

The defendant contends that there is insufficient evidence of probable cause to support the arrest warrant from the face of the complaint and the testimony of the magistrate.

The affidavit of complaint sworn to by the arresting officer states:

> "Personally appeared before me, the undersigned authority in and for said Municipal Court of Birmingham, D. L. McNutt, who being first duly sworn, says on oath that he has probable cause for believing and does believe that Mike Holderfield whose name is otherwise unknown to affiant, did within twelve months before making this affidavit and within the City of Birmingham, or the Police Jurisdiction thereof:
>
> Did unlawfully on to-wit: May 10, 1978, at approximately 11:20 A.M. at or near 3021 Bessemer Road, Bessemer News, Birmingham, Jefferson County, Alabama, knowingly publish, print, exhibit, distribute, or have in his possession with intent to distribute, exhibit, sell, or offer for sale in the City of Birmingham, Alabama, any obscene matter, to-wit: an obscene book, 'Color Sperma', contrary to and in violation of General City Code 16-18 as amended against the laws and ordinances of the City of Birmingham."

This affidavit in and of itself is insufficient to support a finding of probable cause for a warrant of arrest because it only recites the affiant's belief and contains no supporting facts or circumstances upon which a finding of probable cause could be based. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958).

However, in passing on the validity of an arrest warrant, the reviewing court is not restricted to examining the four corners of the affidavit. *United States v. Character*, 568 F.2d 442, 445 (5th Cir. 1978). A reviewing court may consider an affiant's oral testimony, extrinsic to the written affidavit, which is sworn before the issuing magistrate, in determining whether the warrant was founded on probable cause. *United States v. Hill*, 500 F.2d 315, 320-21 (5th Cir. 1974). Oral testimony is admissible to cure an otherwise defective warrant. *Oliver v. State*, 46 Ala.App. 118, 238 So.2d 916 (1970); *Funches v. State*, 53 Ala.App. 330, 299 So.2d 771, cert. denied, 293 Ala. 752, 299 So.2d 778 (1974).

Officer McNutt, at the time he gave the sworn affidavit before a magistrate for the City of Birmingham, presented the magistrate with the magazine "Color Sperma" which he had personally purchased from the defendant seven days earlier. The magistrate examined the magazine for ten minutes before issuing the arrest warrant. The affidavit together with the presentation of the alleged obscene matter to the magistrate support the finding of probable cause and issuance of the warrant despite the fact that the affidavit is conclusionary.

III

The defendant's contention that Birmingham City Ordinance 16-18 as amended was systematically and selectively

enforced against him resulting in purposeful and intentional discrimination violative of the equal protection clause of the Fourteenth Amendment was found to be without merit in *Starley v. City of Birmingham*, Ala.Cr.App., 377 So.2d 1171 (1979). The evidence presented by the defendant in this case is substantially identical to that presented in *Starley*. There simply has been no evidence to indicate an intentional selectivity based upon an unjustifiable standard.

We have searched the record for error and, finding none, affirmed the judgment of the circuit court.

AFFIRMED.

All Judges concur.

APPENDIX B

Ex Parte Michael HOLDERFIELD.

Re: Michael Holderfield

v.

The City of Birmingham.

79-333.

Supreme Court of Alabama.

March 7, 1980.

Certiorari to the Court of Criminal Appeals (6 Div. 38), 380 So.2d 994.

****

BLOODWORTH, Justice.
WRIT DENIED.

TORBERT, C. J., and FAULKNER, ALMON and EMBRY, JJ., concur.

APPENDIX C

Cary HAWKINS

v.

The CITY OF BIRMINGHAM.

6 Div. 975.

Court of Criminal Appeals of Alabama.

Dec. 4, 1979.

Rehearing Denied Jan. 22, 1980.

BOWEN, Judge.

This is a pornography case based on the sale of the book "Locker-Room Workout" in violation of Section 16-18 of the General Code of the City of Birmingham, 1964, as amended, prohibiting the sale of an obscene book. The defendant was an employee of the Pussycat Adult Theater. The defendant was tried before a jury on the complaint and found guilty. Sentence was 180 days hard labor and a fine of $500.00.

The issues in this case are exactly identical and the facts substantially identical to those in *Holderfield v. The City of Birmingham*, Ala.Cr.App., 6 Div. 38, 380 So.2d 990 (Ms. December 4, 1979). The judgment of the trial court in this case is affirmed on authority of our opinion in *Holderfield*.

AFFIRMED.

All Judges Concur.

Writ denied, Ala., 380 So.2d 995.

APPENDIX D

Ex Parte Cary HAWKINS.

(Re: Cary Hawkins

v.

The City of Birmingham).

79-334.

Supreme Court of Alabama.

March 7, 1980.

Certiorari to the Court of Criminal Appeals (6 Div. 975), 380 So.2d 994.

BLOODWORTH, Justice.

WRIT DENIED.

TORBERT, C. J., and FAULKNER, ALMON and EMBRY, JJ., concur.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law. . . , abridging the freedom of speech, or of the press. . . ."

2. The Fourth Amendment states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

4. The pertinent provisions of the Fourteenth Amendment are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

5. Ala. Const. Art. I § 5 states:

"That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

6. Ala. Code § 12-14-6 (1975) states:

"All cases in municipal courts shall be tried by a judge without a jury."

7. Section 2-97 of the General Code of the City of Birmingham, Alabama, 1964, as amended, in pertinent part provides:

"It shall be the duty and function of city magistrates to issue writs of arrest in accordance with the provisions contained herein.

"A writ of arrest can be issued by a city magistrate only upon a complaint being made before such magistrate that an offense has, in the opinion of the complainant, been committed, and the magistrate must examine the complainant, and such witnesses as complainant may propose, on oath, take their depositions in writing, and cause them to be subscribed by the person making them.

"The depositions must set forth the facts stated by the complainant and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

"If the magistrate is reasonably satisfied from such deposition that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant is guilty thereof he must issue a warrant of arrest."

8. City of Birmingham ORDINANCE, Sections 16-16 and 16-18 provide:

"AN ORDINANCE TO AMEND ARTICLE II OF CHAPTER 16 OF THE GENERAL CODE OF THE CITY OF BIRMINGHAM, 1964, AS AMENDED.

BE IT ORDAINED by the Council of the City of Birmingham, as follows:

SECTION I. That Article II of Chapter 16 of the General Code of the City of Birmingham, 1964, be and is hereby amended to read as follows:

Article II. OBSCENITY.

Sec. 16-16. Definitions.

The following words and terms, when used in this article, shall for the purpose of this article have the meanings respectively ascribed to them by this section:

Distribute. To transfer possession of, whether with or without consideration.

Knowingly. Having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect is for the purpose of avoiding such disclosure.

Nudity. The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.

Obscene. To the average person, applying contemporary community standards, the work or matter, taken as a whole, appeals to the prurient interest; the work or matter depicts or describes, in a patently offensive way, sexual conduct; and the work or matter, taken as a whole, lacks serious literary, artistic, political or scientific value.

Sadomasochistic abuse. Flagellation or torture by or upon a person undressed or clad in undergarments, mask or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one undressed or so clothed.

Sexual conduct. Any act of masturbation, excretory functions, homosexuality, sadomasochistic abuse, nudity, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast, whether or not any such conduct is actual or simulated and lewd exhibition of the genitals.

Work or Matter. Any book, magazine, newspaper or other printed or written material, performance or any picture, drawing, photograph, motion picture or other pictorial representation or any statue, figure of any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

Sec. 16-18. Publishing, printing, etc., prohibited.

It shall be unlawful for any person to knowingly publish, print, exhibit, participate in the exhibition or performance of, or allow or permit the exhibition or performance of, distribute,

or have in his possession with intent to distribute, exhibit, sell or offer for sale any obscene matter in the city or the police jurisdiction thereof."

Title 28, U.S.C. § 1257(3)

§ 1257. State courts: appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> ". . .(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Supreme Court, U. S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1918

IN THE

Supreme Court of the United States

OCOTBER TERM, 1979

CARY HAWKINS AND MICHAEL HOLDERFIELD,
Petitioners,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation,
Appellee/Respondent.

Brief in Opposition

[redacted]I

TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

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No. 79-1918

IN THE

Supreme Court of the United States

OCOTBER TERM, 1979

CARY HAWKINS AND MICHAEL HOLDERFIELD,
Petitioners,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation,
Appellee/Respondent.

MOTION TO DENY WRITS OF CERTIORARI TO REVIEW THE OPINIONS AND JUDGMENTS OF THE ALABAMA COURT OF CRIMINAL APPEALS

The Appellee/Respondent respectfully prays that the Writs of Certiorari be denied Petitioners for review of the opinions and judgments of the Alabama Court of Criminal Appeals entered against them on December 4, 1979.

OPINIONS CITED BY PETITIONERS THAT APPEAR ERRONEOUS

The original opinions appearing on Appendix A, A.1, and Appendix C, A.10 apparently did not contain, *Rehearing*

Denied January 22, 1980 but appeared in 380 So.2d 990 and 380 So.2d 994 respectively. Further in Appendix C, A.10 no reference to 380 So.2d 990 nor the date in December can be found by the City in the body of the Court's original opinion. (Emphasis added)

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. §1257(3). (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending cases. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioners do not in the opinion of the writer present new questions for the first time nor present any special or important reason for granting writs of certiorari. It appears that these cases are not one of the first impression and that the following quotation is applicable.

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S.2d 492, 493, 3 Misc.2d 845."

QUESTIONS PRESENTED

I.

Is the constitutional right to a jury trial satisfied by a two-tier court system?

II.

Is the constitutional right of trial by jury mandated in trials for violation of city ordinances in municipal courts?

III.

In order for the constitutional right to a jury trial to be raised must there be a demand for a jury trial and a refusal by the court to grant it?

IV.

Was the City of Birmingham Ordinance 16-18, as amended, systematically and selectively enforced or administered by the public authority of said City against Cary Hawkins and Michael Holderfield with an evil eye and unequal hand which resulted in a unjust, illegal, intentional discrimination against them as compared with other persons in similar circumstances, thereby violating their rights under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

V.

If an affidavit in the arrest warrant presented to the magistrate is later ruled conclusionary will the affidavit along with presentation of alleged obscene matter to said magistrate be sufficient to support findings of probable cause and the issuance of a warrant for defendant's arrest on the charge of sale of allegedly obscene matter?

VI.

Is the reviewing court restricted to examining the four corners of the affidavits in passing on the validity of arrest warrants.

STATEMENT OF THE CASES

The body of the complaints read as follows:

"Comes the City of Birmingham, a municipal corporation and complains that Cary Hawkins, within twelve months before the beginning of this prosecution, on to-wit: May 10, 1978, and within the City of Birmingham, or the police jurisdiction thereof, at to-wit: 7610 1st Avenue North, Pussycat Adult Theatre, knowingly and unlawfully sold an obscene book or magazine or matter entitled "Locker-Room Workout" to D. L. McNutt which depicted or portrayed the following sexual conduct: Actual act or acts of homosexuality between males, contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended." and

"Comes the City of Birmingham, a municipal corporation and complains that Michael Holderfield, alias Mike Holderfield, within twelve months before the beginning of this prosecution, on to-wit: May 10, 1978 and within the City of Birmingham, or the police jurisdiction thereof, at to-wit: 3021 Bessemer Road, Bessemer News, knowingly and unlawfully sold an obscene book or magazine or matter entitled "Color Sperma" to D. L. McNutt which depicted or portrayed the following sexual conduct: Actual act or acts of fellatio, sexual intercourse, contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

REASONS FOR DENYING THE PETITIONS FOR WRITS OF CERTIORARI

No new substantial constitutional questions are presented.

I.

The right to a trial by jury is satisfied by the two-tier court system. *Ludwig* v. *Massachusetts,* 96 S.Ct. 2781 (1976) at page 2781 said,

> "...The Supreme Court, Mr. Justice Backmun, held that the Massachusetts two-tier court system does not deprive an accused of his Fourteenth Amendment right to a jury trial and does not unduly burden that right; the Court further held that the Massachusetts procedure does not violate the double jeopardy clause of the Fifth Amendment as it is made applicable to the states by the Fourteenth Amendment."

II.

The constitutional right of trial by jury does not extend to trials for violation of city ordinances in municipal courts.

COSTELLO v. *FLAGIN,* 169 Ala. 191, 50 So. 134

EX PARTE STATE EX REL CITY OF BIRMINGHAM, 164 Ala. 576, 51 So. 309

CITY OF BIRMINGHAM v. *WILLIAMS,* 229 Ala. 101, 155 So. 877

DONAHEY v. *CITY OF MONTGOMERY,* 43 Ala.App. 20, 178 So.2d 832

SEC. 12-14-6, CODE OF ALABAMA 1975

Birmingham v. *Evans,* 53 Ala.App. 358, 300 So.2d 396

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Holderfield v. *City of Birmingham,* 380 So.2d 990

Howell v. *City of Birmingham,* Ala.Crim.App. 6 div. 916 (Ms. January 22, 1980)

State v. *Luck,* 353 So.2d 225 cited by Petitoners' Brief at page 12 does not appear to be applicable to the cases at bar because (1) It was a state prosecution rather than municipal; (2) The penalty imposed by L.A.R.S. 14-106 G (a fine of not less than $100 nor more than $1000 or imprisonment in the parish prison for not more than one year or both) entitled the defendant to a jury trial. The potential penalty in *Luck* far exceeded the City's maximum fine of $500, or imprisonmnet in the City jail not exceeding six months or both.

Duncan v. *La.,* 391 U.S. 145, 88 S.Ct. 1944, held in offenses where the sentence is six months or less the right to jury trial may be constitutionally denied. Further, Sec. 12-14-6, Code of Alabama, 1975, and all the cases cited have addresed this question.

Section 12-14-6, Code of Alabama 1975 states:

> "All cases in municipal courts shall be tried by a judge without a jury."
> (Acts 1975, No. 1205, §8-101)

It is well established in this state that a prosecution for a municipal offense is a quasi-criminal proceeding and that, as a general rule, constitutional and statutory provisions, having reference to criminal prosecutions by the state, are not applicable to violations of municipal ordinances. *McKinstry* v. *City of Tuscaloosa,* 172 Ala. 344, 54 So. 629.

III.

In order for the constitutional right to a jury trial to be raised there must be a demand for a jury trial and a refusal by the court to grant it.

In *Duncan* v. *La.*, 88 S.Ct. 1444 at p. 1448 it says, "...We hold that the Constitution was violated when appellant's demand for jury trial was refused."

At page A.5 of Petitioners' Brief, the Court of Criminal Appeals of Alabama stated: "Additionally, we note the defendant never requested a trial by jury in the municipal court. . . ."

Based on this opinion, the City contends that since the Court found that a jury trial was never demanded by either Petitioner, each waived it and neither can be heard to complain now. (See also A.10, Appendix C of Petitioners' Brief, paragraph two.)

IV.

With reference to the alleged conscious, intentional discriminatory enforcement of the obscenity ordinance by the City against Petitioners, their brief referred to the case of *Simonetti* v. *City of Birmingham*, 55 Ala.App. 163, 314 So.2d 83, (1975). The City agrees that this case is material and that the following quotation at page 92 is a correct statement of the law.

> "All the cases recognize that a heavy burden rests on the defendant to establish conscious, intentional discrimination, but if successful in sustaining that burden, the defendant will be entitled to a dismissal of the prosecution as a matter of law . . .".

The City contends this heavy burden has never been met by either Petitioner.

In their brief at page 29, Petitioners cited *John F. Lawhon Furniture Company* v. *Melvin Bailey* (D.C. Ala. CA 72-1109) a Blue Law case, but failed to quote Honorable Sam C. Pointer, Jr., *FINDING OF FACT AND CONCLUSION OF LAW:*

> "I'm persuaded that there is no intentional wrongdoing on the part of the Sheriff's Department in the sense of any willful intent to pick out Lawhon to the exclusion of others.
>
> I'm also persuaded and convinced that there has been unequal enforcement by the sheer practicalities involved, that in fact the stores have not all been treated the same. I think it is understandable that with a lawsuit in which Lawhon has been involved, suing the Sheriff's Department and which it has made advertisements when it was going to be open on Sunday, it is very logical and understandable why the Sheriff's Department, with the red flag waved before it, would respond and make arrests when Lawhon opened on Sunday. Twice that has happened during the period in question this year."

In the present cases, as in *Lawhon,* there was no intentional wrongdoing by the Birmingham Police Department. Further there is no evidence that lawsuits have been filed by Petitioners against the Birmingham Police Department nor did they advertise they would continue to operate Bessemer News and Pussycat Adult Theatre. Neither Petitioner waved a red flag at the Birmingham Police Department, nor was there any unequal enforcement by the City in either case based on any practicalities involved.

There are many cases dealing with the question of discriminatory enforcement of the law. The vast majority have concluded that to sustain a claim of discriminatory enforcement there must be evidence of intentional or purposeful discrimination. The universal way of establishing such is by proof that the enforcement if by race, religion or some other improper classification

or as the result of some other ill-motive such as possibly to embarass a political candidate or punish an enemy. In all cases the issue is the pattern of enforcement. The following citations all adhere to the above stated propositions of law:

1. *Oyler* v. *Boles,* 368 U.S. 448, 82 S.Ct. 501;
2. *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397;
3. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064;
4. *People* v. *Wegman's Food Market, Inc.,* 362 NYS2d 902;
5. *People* v. *Lofton,* 366 NYS2d 769;
6. *Goodman* v. *Kennedy,* 329 A2d 224;
7. *Mulhern* v. *McHenry,* 326 A2d 132;
8. *Gutknecht* v. *City of Sausalitio,* 117 Cal.Rptr. 782;
9. *People* v. *Dobbs Ferry Medical Pav. Inc.,* 332 NYS 168;
10. *State* v. *Solomon,* 254 S.C. 550, 141 SE 2d 818;
11. *People ex rel Moylan* v. *Kur,* 350 NYS2d 990;
12. *United States* v. *Elliott,* 266 F.Supp. 318;
13. *State* v. *Deddens,* 542 P2d 1124;
14. *People* v. *Thomas,* 542 P2d 387;
15. *People* v. *Plamondon,* 236 NW2d 86;
16. *United States* v. *Brookshire,* 514 F2d 786.

Assuming arguendo that Cary Hawkins and Michael Holderfield have carried their heavy burden and presented evidence which created a strong inference of discriminatory prosecution, then the government according to *Associated Industries of*

Alabama v. *State,* 314 So.2d 879, 55 Ala.App. 277, is required to explain it away, if possible, by showing the selection process rested upon some valid ground. This the City of Birmingham has also done. The transcripts and City's Exhibits #1, each prove that the arrests made by the City involved subject matter containing actual sex acts, or obscene matter (not nudes or simulated sex). There were about five to seven arrests made by the City involving subject matter substantially similar to "Sperma," since the year 1978. The latter contained explicit sexual conduct or obscene matter (not nudes or simulated sex).

Cary Hawkins was arrested for the sale of the alleged obscene matter "Locker-Room Workout." During the time from January and May 1978, the officer also visited Seven-Eleven Stores that offered for sale Hustler, Playboy, Oui, Penthouse but made no arrests.

At pages 21 and 28 of Petitioners' brief they quoted *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350, 38 S.Ct. 495. Omitted, however, was the following sentence found at page 495, "The good faith of such officers and the validity of their actions is presumed; when assailed, the burden of proof is upon the complaining party."

At the same page (21) *People* v. *Utica Daw's Drug Co.* was quoted. It is also expressed at 225 NYS2d at p. 136, ". . . It is only when the selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others that a constitutional violation may be found." The Appellee/Respondent agrees with this proposition of law which it contends is supported by both transcripts in that there was no discrimination against the persons prosecuted and there was a general enforcement against others in their class (those allegedly selling obscene matter).

The City denies Michael Holderfield's allegation of intentional discriminatory enforcement by Officer Dennis McNutt. His instructions were to go to the adult bookstores in Birming-

ham and check for possible violations of General City Code 16-18, as amended. The Birmingham Police Department did not exercise prosecutional discretion by arresting Michael Holderfield nor was this section of the City Code enforced against him or anyone else based on an unjustifiable standard such as race, religion, or other arbitrary classification. A purchase was made by Vice Officer Dennis McNutt, but his superiors neither ordered him to make a purchase from a particular store nor to arrest a certain individual.

The City also denies Cary Hawkins' allegation that there was an intentional discriminatory enforcement of Birmingham's obscenity Ordinance 16-18, as amended, against him. Officer McNutt was never instructed by his superiors to go to a particular bookstore.

To show that the police are discriminating, the defendant has the burden, *inter alia,* to show that constabulary are acting with malice toward him. See *People* v. *Utica Daw's Drug Co.,* 16 A.D.(1963) 2d 12, 225 NYS2d 123, and *Two Guys* v. *McGinley,* 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961). That burden Petitioners have not satisfied. *They are entitled to equal protection of the law, not protection from the law.* (Emphasis Added)

Central to his alleged discriminatory enforcement attack is the applicability of *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) and *Oyler* v. *Boles,* 368 U.S. 448 (1961). The provisions of Birmingham's obscenity statute do not facially violate either Michael Holderfield's nor Cary Hawkins' constitutional rights. As set forth in *Oyler* v. *Boles,* supra, the Court recognized the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.

It is permissible for law enforcement officials to select "test" or "notoriety" cases for prosecution. There are always those who escape prosecution. Here, *neither* of the *Petitioners' evidence have met* the *heavy burden* of proving *unequal enforcement* by *city officials* - that the obscenity laws have not

been enforced equally against all violators with the same intensity as against them. Moreover, assuming arguendo, a disparity of treatment between Petitioners and others similarly situated, neither have demonstrated that this *difference in enforcement* is based upon a decision to enforce the law against them because of any improper motive. (Emphasis Added)

The burden of explanation should not be shifted to the City of Birmingham. Each Petitioner should first establish a *prima facie* case of discrimination. More than mere unequal enforcement is required to constitute discrimination of the sort condemned as unconstitutional in *Yick Wo*. For the unequal enforcement to be discriminatory against any defendant, he must show either that the disparity is based upon some constitutionally impermissible standard, such as race, religion, or other aribtrary classification. This, neither Petitioner has done.

There was a marked distinction made by Officer McNutt in describing the matter in Playboy and Penthouse (alleged sales or offer of sale in various stores, Seven-Eleven Stores) which he testified contained nudes and simulated sex acts *in comparison with* the book before this Honorable Court, City's Exhibit 1 introduced in evidence, "Color Sperma." (Emphasis Added) The latter graphically depicts act or acts of sexual intercourse, fellatio.

In Cary Hawkins case there was an investigation of "Club Magazine" at a U-Tote-M Store but no arrest was indicated. In addition other Seven-Eleven Stores in the City of Birmingham were visited by Officer McNutt between January and May 1978 on approximately two occasions where magazines such as Hustler, Playboy, Oui, Penthouse were being offered for sale but no arrests were made.

The juries found that the subject matters allegedly sold on May 10, 1978 in each case at Bessemer News and The Pussycat Adult Theatre were obscene. The City contends this placed each defendant in a class of stores selling matter explicitedly depict-

ing the performance of actual sex acts and were prosecuted by the City. Each subject matter met the guidelines or elements as set forth in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1974).

The law as set forth in *Miller* was satisfied when there was depicted actual sexual acts between individuals, but this is not true regarding the magazines offered for sale at other stores in Birmingham which contained pictures of nude bodies and simulated sexual activities.

If there is a jury trial in the Circuit Court, the jurors have not only the right but the duty to determine if the matter in issue is obscene and convict if the evidence so warrants, and that is exactly what they did in each of the cases at bar.

In their brief on page 21, *Snowden* v. *Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, was cited which *admits* the City of Birmingham's contention that the *heavy burden rests on the defendant* to *establish conscious, intentional discrimination.* (Emphasis Added).

As long as the enforcement is not designed to discriminate against a particular individual in a particular class it would not be held discriminatory. If an act cannot be enforced equally, it would be facially void. No proof has been adduced establishing an evil motive on the part of the City resulting in this code section being discriminatorily applied to either one of the Petitioners.

V.

A conclusionary affidavit along with the presentation of the alleged obscene matter to the magistrate will support the finding of probable cause.

Paragraph three (3) under Petitioners' Appendix A, A.7 (Opinion of the Court of Criminal Appeals of Alabama) regard-

ing Petitioners Michael Holderfield and the (Court's Opinion) in Cary Hawkins, Appendix C, A.10 has adequately addressed the above issue.

In Michael Holderfield's case, the magistrate examined the book and read "Color Sperma" for ten (10) minutes while in Cary Hawkins' case the magistrate read "Locker-Room Workout" for about fifteen (15) minutes before issuing the respective arrest warrant.

VI.

In passing on the validity of an arrest warrant, the reviewing court is not restricted to examining the four corners of the affidavit.

UNITED STATES V. *CHARACTER,* 568 F2d 442

KNOX V. *STATE,* 172 So.2d 787, 42 Ala. 578

It is obvious that the examination of each subject matter by the magistrate satisfied any defect in the affidavit, if any, that existed in the arrest warrants.

The Appellee/Respondent understands that this Honorable Court has requested all exhibits introduced in evidence in both cases be forwarded for review. This will enable the Court to examine City's Exhibit No. 1 in each case, "Color Sperma" and Locker-Room Workout," *in comparison with* Petitioners' Exhibits, to-wit: Hustler, Swank, Erotic Art of the Masters, High Society and Velvet.

Our contention is that all three criteria as enunciated in *Miller* coalesced in City's Exhibit No. 1 in "Color Sperma" and "Locker-Room Workout" as evidenced by the jury's verdicts; the element of *patently offensive* is *lacking* in each of *Petitioners' exhibits.* (Emphasis Added)

In *Jenkins* v. *Georgia,* 94 S.Ct. 2750, the judgment of the Supreme Court of Georgia was reversed and at page 2755 this Honorable Court said:

> "[9] Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the Miller standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in Miller of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards.
>
> Appellant's showing of the film 'Carnal Knowledge' is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in Miller, Id., at 35, 93 S.Ct. at 2621. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia."

At page twenty two (22) of Petitioners' brief they alleged that the uncontradicted evidence is that arrests in the City of Birmingham for violation of its obscenity ordinance were directed

only against operators or employees of adult book stores and adult theatres. There were six to eight such adult book stores which sold publications depicting or describing the sexual conduct described in the City's obscenity ordinance. At the same time there were hundreds of drug stores, convenience stores, or other business establishments open to the general public which regularly sell publications depicting sexual conduct in presumptive violation of the City's obscenity ordinances and not one of these operators or employees has ever been arrested or tried for violating this same ordinance.

By inference, *Jenkins* v. *Georgia* draws a distinction between hard core sexual conduct or obscenity and soft core sexual conduct or obscenity the former being punishable when the three criteria coalesce as enunciated in the landmark case of *Miller* v. *California,* 93 S.Ct. 2607. "Carnal Knowledge" contained nudity but the camera never focused on the bodies of the actors during the ultimate sex scenes. The "patently offensive" element in *Jenkins* v. *Georgia* was not found to exist by this Honorable Court and, therefore, the judgment of the Supreme Court of Georgia was reversed. Likewise the non-adult book stores or other business establishments whose operators or employees have not been arrested by the City of Birmingham for alleged violation of its obscenity ordinance (as set forth on page twenty two (22) of Petitioners' brief) apparently were engaged in the sale or offer for sale of material depicting soft core sexual conduct or pornography which did not meet the three *Miller* criteria during the time frame involved prior to or on the date of the sales of "Color Sperma" and "Locker-Room Workout" took place.

If a prosecutional classification was made by the City of Birmingham in making obscenity arrests as alleged by the Petitioners at page twenty two (22) of their brief, it was for hard core obscenity rather than soft core obscenity as enunciated in *Miller* which is a reasonable classification. The six to eight stores falling within this particular classification were subject to

arrests. The City of Birmingham's actions have not been arbitrary, capricious or discriminatory against either Petitioner, as compared with other persons in similar circumstances (other adult book stores and adult theatres) nor has the public authority of the City of Birmingham administered the Birmingham obscenity ordinance against either Petitioner with an evil eye or unequal hand.

CONCLUSION

For the foregoing reasons, Writs of Certiorari should be denied the Petitioners by this Court to review the opinions and judgments of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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